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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may exercise diversity jurisdiction, without requiring an exhaustion of tribal remedies, over a commercial breach of contract action brought against an on-reservation corporation wholly owned by an Indian tribe where the dispute implicates tribal sovereignty.

2. Whether a tribal waiver of sovereign immunity with respect to a written contract can be impliedly extended to a claim brought by a stranger to that contract.

3. Whether a Letter of Intent agreement between a governmental subdivision of an Indian tribe and a non-Indian to establish and operate a manufacturing operation on tribal land is an agreement for services "relative to" tribal land within the meaning of 25 U.S.C. § 81.

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PETITION FOR WRIT OF CERTIORARI

Sioux Manufacturing Corporation[1] ("Sioux Manufacturing") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The unpublished opinions of the United States District Court for the Northern District of Illinois are reproduced at pages 22-42 of Petitioner's Appendix ("Pet. App."). The

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[1] Sioux Manufacturing Corporation has no parent companies or subsidiaries, but is wholly owned by the Devils Lake Sioux Indian Tribe.

opinion of the United States Court of Appeals for the Seventh Circuit is reported at 983 F.2d 803 and is reproduced at pages 1-21 of Pet. App.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on January 8, 1993. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 27, 1993. Thereafter, on July 7, 1993 and again on August 3, 1993, Justice Stevens signed orders extending the time for filing this petition for certiorari to and including September 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND OTHER LAWS INVOLVED

This case concerns the use of federal diversity jurisdiction under 28 U.S.C. § 1332 (1988) to impair Indian tribal sovereignty. Pet. App. 47.

This case also concerns provisions of the Devils Lake Sioux Tribal Law and Order Code ("Tribal Code") which are set forth at pages 49-52 of Pet. App.

The case also concerns the protective provisions of 25 U.S.C. § 81 (1988), which are set forth at Pet. App. 45-46.

STATEMENT OF THE CASE

A. NATURE OF THE CONTROVERSY

This is a diversity suit in which a law firm employed by a third party seeks recovery of its legal fees, in the first instance in the federal court, from an on-reservation corporation wholly owned by an Indian tribe. Jurisdiction

of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a partnership of citizens of the states of Illinois and Indiana, and the defendant, a corporation, deemed a citizen of the state of North Dakota.

Sioux Manufacturing was created by the Devils Lake Sioux Tribe ("Tribe"), a federally recognized Indian tribe. The corporation was organized under the Tribe's law and order code as a governmental subdivision of the Tribe. Its offices and sole facility are located on the Devils Lake Sioux Indian Reservation ("Reservation") on tribal trust land.

The Reservation is located entirely within the state of North Dakota and was established by treaty. *See* Treaty between the United States of America and the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, Feb. 19, 1867, 15 Stat. 505. The Tribe has enacted an extensive law and order code and has established a tribal court system, which includes both a trial and appellate court with civil and criminal jurisdiction.

On March 7, 1990, John Veleris, acting on behalf of Medical Supplies and Technology, Inc. ("MST"), an Illinois corporation, and Robert Manning, acting on behalf of Sioux Manufacturing, signed a Letter of Intent agreement. That agreement, set forth on pages 56-67 of Pet. App., provided for the establishment, construction, development, and operation of a manufacturing facility on the Tribe's trust land within the Reservation to reduce tribal unemployment.

The Letter of Intent, among other things, provided that MST would provide and sell the "architectural and engineering drawings and specifications for the building in which the Products [would] be produced" and "waste and

environmental plans" for the development and operation of the facility on reservation land. Pet. App. 56-57. The agreement also set forth the parties intention that MST would have an "exclusive" contract to provide "consulting services . . . for the management and operation of the Business." *Id.* at 58, 62.

The Letter of Intent outlined a plan of multiple payments to MST. Included were payments for start-up expenses, consulting services and the purchases of MST's assets. *Id.* at 57-60. In addition, MST would receive a significant percentage of the net profits off the top and a percentage of all gross sales regardless of whether the venture was profitable. *Id.* at 60-61.

Further, the Letter of Intent contained a clause whereby if the transactions contemplated were not consummated within 60 days of the date of the agreement, Sioux Manufacturing would pay MST for its reasonable legal fees. *Id.* at 64-65.

After the Letter of Intent was signed, MST began business operations on tribal trust lands utilizing Sioux Manufacturing facilities and MST was paid over $150,000 by Sioux Manufacturing. The parties also entered into subsequent agreements modifying the Letter of Intent. However, the deal was never consummated and the manufacturing business was never established. On November 1, 1990 MST ceased operations within the Reservation.

B. THE PROCEEDINGS BELOW

In May of 1991 MST sued Sioux Manufacturing in Illinois State Court for breach of contract seeking seven million dollars in damages, claiming Sioux Manufacturing wrongfully failed to establish the manufacturing operation on the Reservation. In June of 1991, Altheimer and Gray

("Altheimer"), a Chicago-based law firm which provided MST with legal services in connection with the Letter of Intent, filed a diversity suit against Sioux Manufacturing in Federal District Court for the Northern District of Illinois. Altheimer contended under Illinois law that it was a third-party beneficiary to the Letter of Intent and sought payment directly from Sioux Manufacturing for legal services provided to MST.

Sioux Manufacturing removed MST's action to the federal court and the two cases were consolidated. Sioux Manufacturing then filed a motion seeking a dismissal of both cases on various grounds, including: the plaintiffs were required to exhaust tribal remedies before the federal court could proceed with the cases; the suits against Sioux Manufacturing were barred on the basis of sovereign immunity; and the breach of contract actions were barred because the underlying contract was void for lack of compliance with the protectionist requirements of 25 U.S.C. § 81.

The district court declined to stay the federal court actions pending exhaustion of tribal remedies, but did grant summary judgment in favor of Sioux Manufacturing in both suits. The district court concluded that the breach of contract claims could not be sustained, as the Letter of Intent was void under 25 U.S.C. § 81. This statute was enacted to protect Indian tribes. The statute provides that an agreement "made by any person with any tribe of Indians . . . for the payment or delivery of any money . . . or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands" will be null and void unless the parties comply with the six listed requirements as to form and manner of execution of the agreement. 25 U.S.C. § 81, Pet. App. 45. One of the requirements is that the

agreement be approved by the Secretary of the Interior. *Id.* The district court found that the Letter of Intent "was inextricably rooted in a planned transaction regarding Indian land" and therefore was null and void for lack of the required approval. Pet. App. 40.[2]

Altheimer appealed, but MST did not. In its reversal of the district court's decision, the Seventh Circuit first addressed the merits of the contractual voidness question. Disregarding the plain language of section 81, which broadly protects Indian tribes in agreements for "services . . . relative to [Indian] lands", the appellate court restricted the statute's application to "protect[ing] Indian tribes in land transactions" which "cede any right, interest or control of Indian lands." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 805, 812 (7th Cir. 1993), Pet. App. 1, 14.

Next, in considering the question of tribal sovereign immunity, the appellate court interpreted and applied various tribal ordinances, as well as reviewed the actions of individuals acting for Sioux Manufacturing, and concluded that Sioux Manufacturing's sovereign immunity had been waived. *Id.* at 812, Pet. App. 16.

Lastly, the Seventh Circuit addressed the tribal exhaustion doctrine. The appellate court concluded that an exhaustion of tribal remedies was not required, because Sioux Manufacturing had agreed in the Letter of Intent to submit to the venue and jurisdiction of the federal courts in Illinois. *Id.* at 815, Pet. App. 20-21.

The Seventh Circuit, on Sioux Manufacturing's motion, has recalled and stayed its mandate pending the disposition of this petition.

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[2] The district court did not address the sovereign immunity issue.

REASONS FOR GRANTING THE WRIT

This case presents important and frequently recurring questions regarding the role of federal diversity courts in adjudicating commercial contract disputes affecting the interests of Indians on reservation lands.

I.

THE SEVENTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE EIGHTH AND NINTH CIRCUITS.

A. This Court's Decisions In *National Farmers Union* And *Iowa Mutual* Require The Local Tribal Court, In The First Instance, To Determine The Issues Of This Case.

This Court has historically required the federal courts to respect tribal autonomy and self-government when exercising their adjudicatory jurisdiction. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883). In recent years, following Congress' clearly delineated policy of "encouraging tribal self-government," the Court has imposed a procedural bar to the exercise of civil adjudicatory jurisdiction by a federal diversity court over commercial matters relating to reservation affairs. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). The Court has required exhaustion of tribal remedies and directed that such disputes must be litigated in the first instance in the local tribal court and not in the federal courts. *Id.*; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

The Seventh Circuit, however, trespasses on the realm of tribal autonomy and self-government, which has been so carefully respected by this Court and other federal appellate courts, by redefining the boundaries between the

civil courts of the federal government and Indian tribes. It accomplishes this by re-characterizing the doctrine of exhaustion of tribal remedies from a bright line "inflexible bar to [the] consideration of the merits" of a dispute, *Granberry v. Greer*, 481 U.S. 129, 131 & n.4 (1987), to a flexible discretionary principle. Exercise of that discretion, the Seventh Circuit holds, would turn on a federal court's interpretation and application of tribal law,[3] review of the actions of tribal officials in Indian country and ultimately a determination of what is in the tribe's best interests. 983 F.2d at 814-15, Pet. App. 18-21.

The appellate court's flawed analysis is best exemplified by the court's approach to the question of whether an official of Sioux Manufacturing has the power to and, if so, actually did waive the Tribe's adjudicatory authority over an action brought by Altheimer. Tribal law permits only the Tribe's elected governing body, the Tribal Council, to waive the requirement of exhaustion of tribal remedies. Tribal Code § 2-2-104, Pet. App. 50. Further, any such waiver must be expressly limited as to grantee. *Id.* The Seventh Circuit ignores these restrictions and proceeds to find a waiver of the Tribe's sovereign adjudicatory authority through the actions of an official of Sioux Manufacturing. The underlying basis for this finding was the federal court's belief that "the Tribe's efforts to improve the reservation's economy may come to naught" if the actions of an official of Sioux Manufacturing are not

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[3] This case involves a number of significant issues which require interpretation of tribal law. For example, one issue is whether the Tribe has waived the requirement of exhaustion of tribal remedies. *See* Tribal Code § 2-2-104, Pet. App. 50. Also at issue is the question of whether Sioux Manufacturing's sovereign immunity has been waived to permit a claim against it by Altheimer. *See* Part II of this petition, *infra*.

imputed to the Tribe. 983 F.2d at 815, Pet. App. 21. Further, the court made Altheimer the grantee of the purported waiver even though Altheimer was not expressly identified as such in the Letter of Intent. Such reasoning is clearly contrary to Tribal law and undermines both federal policy and clear historical precedent of this Court which promotes direct, independent and exclusive authority of tribal courts over civil disputes arising out of reservation affairs. *Iowa Mutual*, 480 U.S. at 18; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978); *Williams v. Lee*, 358 U.S. 217, 223 (1959). *See also Talton v. Mayes*, 163 U.S. 376, 385 (1896) (interpretation and application of tribal law are "solely" matters within the jurisdiction of the tribal court).

The obvious premise for the Seventh Circuit's decision is a flawed paternalistic theory that federal diversity courts are equally and in certain circumstances better qualified than tribal courts to adjudicate commercial contract disputes affecting the interests of Indians on tribal reservation land. Such reasoning impedes both of the imperatives which the exhaustion doctrine is intended to promote. First, it impedes the imperative of avoiding federal court infringement "upon tribal lawmaking authority." *Iowa Mutual*, 480 U.S. at 16. If tribal self-government means anything, it certainly must include tribal court review of tribal law affecting the waiver of governmental rights and immunities by individuals. Due to the influence of Indian traditions and customs, tribal court interpretations may differ from interpretations rendered by a non-Indian court. *United States v. Wheeler*, 435 U.S. 313, 331-32 (1978).

Secondly, the appellate court's reasoning impedes the imperative of avoiding placement of the federal court "in direct competition with the tribal courts, thereby impair-

ing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16. As the Seventh Circuit acknowledges, the present dispute implicates an Indian tribe's self-government and self-determination interests, including the tribe's efforts to improve its reservation economy. 983 F.2d at 815, Pet. App. 20-21. Civil jurisdiction over such an action "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. There is, however, no indication that Congress intended the diversity statute to permit a federal court to interject itself into matters of tribal self-government and self-determination in adjudicating, in the first instance, a commercial dispute. *See Iowa Mutual*, 480 U.S. at 18.

Accordingly, the Seventh Circuit's opinion is not only inconsistent with the decisions of this Court, but it is also clearly an improper encroachment upon the self-governing rights of Indian tribes to make and enforce their own laws and an impediment to the growth and development of tribal courts.

B. Certiorari Should Be Granted To Resolve Conflicts Between The Court Of Appeals For The Seventh Circuit And The Courts Of Appeals For The Eighth And Ninth Circuits.

The Seventh Circuit in this case, without requiring an exhaustion of tribal remedies, erroneously elects to interpret and apply tribal law to resolve questions surrounding the validity and scope of purported waivers of tribal sovereign rights and immunities. 983 F.2d at 812-15, Pet. App. 15-21. This holding conflicts with the decisions of the Courts of Appeals for both the Ninth and Eighth Circuits. The Ninth Circuit, in an *en banc* opinion, held that

because issues surrounding a claim of tribal sovereign immunity would "require a careful study of the application of tribal laws and tribal court decisions," a federal diversity court should stay its hand until after the tribal court has an "opportunity to resolve the question." *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992). The Eighth Circuit Court of Appeals has reached the same conclusion, holding that a federal diversity court should not address the question of tribal sovereign immunity until after the federal court resolves the issue of whether an exhaustion of tribal remedies is necessary. *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1277 n.3 (8th Cir. 1987). If exhaustion is required, the federal court should decline to reach the sovereign immunity issue. *Id.*

The Seventh Circuit's approach conflicts with both the Eighth and Ninth Circuits, because the Seventh Circuit advocates addressing and resolving the sovereign immunity issue prior to considering the exhaustion issue. Furthermore, the Seventh Circuit does not require exhaustion even where resolution of that issue and the issue of sovereign immunity will require interpretation and application of tribal law.

The Seventh Circuit also addresses and resolves the merits of the contractual voidness issue under 25 U.S.C. § 81 before addressing the question of whether exhaustion of tribal remedies is necessary. 983 F.2d at 808-812, Pet. App. 7-15. This aspect of the Seventh Circuit's decision conflicts with the Ninth Circuit's decision in *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992). There the Ninth Circuit held that where federal law does not give the federal court exclusive jurisdiction, the principle of judicial self-restraint regarding activities occurring inside the reservation is so strong that the federal court

should abstain from considering the merits of a dispute, even where the federal government seeks to enforce federal law. *Id.* Likewise here, federal law does not sanction the Seventh Circuit's approach in resolving the merits of the voidness issue under section 81 and utilizing that decision as a means to avoid the necessity of exhaustion.[4]

For these reasons, the decision of the Seventh Circuit is in conflict with the decisions of the Eighth and Ninth Circuits and the writ of certiorari should be granted.

II.

THE DECISION BELOW ERRONEOUSLY APPLIES TRIBAL AND FEDERAL LAW TO STRIP AWAY TRIBAL SOVEREIGN IMMUNITY BY IMPLICATION.

The Seventh Circuit, in section B of its opinion, erroneously interprets and applies tribal law and the decisions of this Court dealing with the doctrine of sovereign immunity. The Seventh Circuit extends a limited waiver of tribal sovereign immunity "with respect to any written contract entered into by the Corporation" to include not only claims brought by a contracting party, but also claims brought by a stranger to the contract. Articles of Incorporation of Sioux Manufacturing Corporation § 4.2.2, Pet. App. 53.[5]

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[4] *See also Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 n.16 (9th Cir. 1989) (an argument based on a contractual waiver of the exhaustion doctrine is "weak" where the validity of the waiver clause is in dispute under 25 U.S.C. § 81).

[5] A related issue which arises in a different factual scenario is before the Court in the Petition for Certiorari filed in the case of *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3621 (U.S. Feb. 23, 1993) (No. 92-1398). One

(Footnote continued on following page)

As a matter of both tribal and federal law, while sovereign immunity may be waived by a tribe itself, the general rule remains that such a waiver must be express and unequivocal and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; Tribal Code §§ 2-2-104, 10-4-106, Pet. App. 50, 51-52. Courts are not free to extend a waiver beyond that which the sovereign intended. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). Further, individual officials have no power to waive conditions or limitations imposed by law with respect to suits against an immune entity. *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 513 (1940); Tribal Code §§ 2-2-104, 10-4-106, Pet. App. 50, 51-52.

The Seventh Circuit, while not expressly stating why, assumes that a waiver of immunity for Altheimer's claim could be implied by using third party beneficiary principles. The court is in error. First, third party beneficiary principles do not comport with tribal law. Waivers of sovereign immunity are disfavored and tribal law requires that the grantee of such a waiver be expressly identified. Tribal Code § 2-2-103, Pet. App. 49-50. Altheimer is not a party to the Letter of Intent nor are they expressly identified as an intended beneficiary of any waiver of sovereign immunity. Significantly, Congress also expresses its concerns along this same line in its protective statutes covering contracts with Indian tribes and requires that parties in interest be expressly identified. *See* 25 U.S.C. § 81.

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[5] *continued*
of the questions presented for the Court's consideration is whether common law immunity of an Indian tribe under federal law extends to a tribal governmental entity engaged in commercial activity off the reservation.

Secondly, third-party beneficiary law principles derived from state law can not be used to imply a waiver of immunity for claims brought against Indian tribes. The "morass" of third-party beneficiary principles is "plagued by uncertainties, doctrinal and conceptual difficulties, and confusion." *Ables v. United States*, 2 Cl. Ct. 494, 499 (1983), *aff'd*, 732 F.2d 166 (Fed. Cir. 1984) (table). Those principles simply can not provide the necessary unequivocal expression of intent to grant Altheimer a waiver of Sioux Manufacturing's sovereign immunity. As the Ninth Circuit notes in *Pan American Co. v. Sycuan Band of Mission Indians*, "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." 884 F.2d 416, 419 (9th Cir. 1989), *citing USF & G*, 309 U.S. at 513.

Accordingly, the decision below is in conflict with the decisions of this Court and tribal and federal law and review by this Court is respectfully requested.

III.

THE DECISION BELOW VIOLATES 25 U.S.C. § 81.

From the first days of this nation, the Federal Government has sought to respect the sovereignty of Indian tribes, including protecting tribal property. Such federal policy has been necessary for the survival of the Indian tribes and their way of life. Felix S. Cohen, *Handbook of Federal Indian Law* 509 (1982 ed.). Primary among these protections are the requirements embodied in 25 U.S.C. § 81.[6] Those requirements govern the form and

[6] *See also* 25 U.S.C. § 177 (1988) (prohibiting land transactions with Indian tribes); 25 U.S.C. §§ 261-264 (1988) (regulation of trade in Indian Country).

manner of execution of tribal contracts. The Seventh Circuit's decision, however, enables the Letter of Intent agreement and other agreements to circumvent the protections provided by section 81.

A. The Seventh Circuit Distorts The Plain Language Of Section 81.

The language of section 81 is straightforward:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money . . . or for the granting or procuring any privilege to him, or any other person in consideration of *services for said Indians relative to their lands* . . . unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior. . . .
>
> . . . .
>
> All contracts or agreements made in violation of this section shall be null and void. . . .

25 U.S.C. § 81, Pet. App. 45-46 (emphasis added). The crucial inquiry, here, is whether the Letter of Intent calls for "services" to be provided "relative to" the Tribe's land.

However, the Seventh Circuit's characterization of section 81 and its analysis of the statute's application makes clear that the appellate court is disregarding the literal or usual meaning of the words of the statute. The Court begins its opinion with the following characterization of section 81: "This case deals with the modern application of a 19th century federal statute designed to protect Indian tribes *in land transactions*." *Altheimer & Gray*, 983 F.2d at 805, Pet. App. 1 (emphasis added). Further, in

its analysis the Seventh Circuit concludes: "In short, the Tribe did not cede any right, interest or control of Indian lands to MST [the non-Indian]." *Id.* at 812, Pet. App. 14. No support can be found in the actual language of section 81 for the appellate court's invention of a requirement limiting the application of the statute to "land transactions."

The proviso "relative to their lands" is a broad term.[7] Consistent with its purpose, which is to protect Indian tribes from "improvident and unconscionable contracts," *In re Sanborn*, 148 U.S. 222, 227 (1893), the plain language of section 81 protects Indian tribes in much more than land transactions. Granted, land transactions fall within the ambit of section 81; they are, by definition, relative to tribal land. However, it is clear under the literal and usual meaning of the statutory language that Congress intends to cover much more than land transactions, because the relevant inquiry is whether the "services" to be provided under the agreement are "relative to" tribal land.

B. The Seventh Circuit's Decision Conflicts With This Court's Application Of Section 81.

The Supreme Court recognized the breadth of section 81 under the plain language of that statute in *Green v. Menominee Tribe*, 233 U.S. 558 (1914), which involved a contract to supply logging equipment to the Menominee Tribe. A non-Indian supplier was to be paid out of the proceeds of logging. *Id.* at 565. The only connection be-

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[7] A noted treatise on federal Indian law has described § 81, as originally enacted, as "prohibit[ing] *most* contracts between non-Indians and tribes . . . unless approved by the Secretary of Interior and the Commissioner of Indian Affairs." Felix S. Cohen, *Handbook of Federal Indian Law* 143 (1982 ed.) (emphasis added).

tween the supply contract and tribal land was that the logging operation was to take place on the reservation. *Id.* at 563.

Claiming that he had not been paid for the equipment, the supplier brought an action, which was dismissed, *inter alia*, for failure to comply with the requirements of R.S. § 2103, renumbered now as 25 U.S.C. § 81. Affirming the lower court's dismissal, the Supreme Court reasoned:

> [W]e think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered.

Id. at 569.[8]

There is no denying that the Supreme Court found the supply contract in *Green* to be "relative to" tribal land.[9] Crucial to that decision were the facts that the logging operation took place on tribal land, and that section 2103,

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[8] Stated another way, "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), *quoting Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

[9] *See Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 617 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1217 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

renumbered now as section 81, was intended to protect Indian tribes from improvident contracts. In the abstract, the supply contract in *Green* could be said to have no relation to land; the contract was for supplies and equipment in exchange for money. Given the plain language of the statute and the policy underlying it, the Supreme Court correctly applied the statute broadly to protect the Menominee Tribe by reading the supply contract in context. Though merely a supply contract, the agreement was rationally tied to tribal land.

Likewise, in this case, the Letter of Intent is inextricably tied to tribal land. Here, the manufacturing operation on tribal land is to affect tribal land to the point that architectural and engineering drawings and specifications for the manufacturing plant, as well as waste and environmental plans, are necessary. Pet. App. 57. The Letter of Intent, like the agreement in *Green*, specifically implicates Indian lands in the payment of money and the granting of privileges to the non-Indian. For example, the Letter of Intent provides that as a result of the establishment of the manufacturing operations on tribal trust lands, MST is to receive a significant percentage of the net profits off the top and a percentage of all gross sales regardless of whether the venture is profitable. Pet. App. 60-61. In addition, MST is to be given significant control of the development, management and operations of the manufacturing business on tribal trust lands. *Id.* at 58-62. Not surprisingly, the Letter of Intent specifically contemplated needing approval from the Bureau of Indian Affairs of the Department of the Interior. *Id.* at 56.

Although cited by Sioux Manufacturing in its briefs and at oral argument, the Seventh Circuit did not discuss *Green* in its opinion. Instead, the Seventh Circuit attempts to glean authority for limiting the scope of application of

section 81 from a number of recent circuit and district court decisions. 983 F.2d at 811, Pet. App. 12-13. Those cases do not support the Seventh Circuit's decision, as they actually extend, not limit, the statute's application to cover various service agreements. *See Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1404 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988); *A. K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 787 (9th Cir. 1986); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1218 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

C. The Legislative History Of Section 81 Does Not Support The Opinion Below.

The legislative history and policy underlying section 81 support the expansive language of that statute. From the earliest discussions of section 81, there have been two competing policy concerns. First, of course, was the policy to protect Indians from improvident contracts. Cong. Globe, 41st Cong. 3d Sess. 1483-1487 (1871). Secondly, concerns were expressed about hindrances to the Indians' freedom to contract. *Id.* at 1486. Despite the latter concern, Congress elected to enact the original protectionist statute in 1871 utilizing the same broad language which raised those concerns. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570.

The principle targets of the legislation were attorneys and claims agents. *See* Cong. Globe, 41st Cong., 3d Sess. 1483-87 (1871). There is nothing in the legislative history that suggests that section 81 is to be limited to land transactions. An extensive report of the House Committee on

Indian Affairs, which deals with the frauds which the statute was designed to circumvent, indicates that Congress particularly intended to protect against the "godless robbery" of Indians by attorneys and claims agents seeking to enforce agreements calling for the payment of monies or the granting of special privileges. Investigation of Indian Frauds, H.R. Rep. No. 98, 42d Cong., 3d Sess. 1, 5, 7-9 (1873). Further, it is clear from the legislative history surrounding the last occasion when Congress amended section 81, Act of Aug. 27, 1958, Pub. L. 85-770, 72 Stat. 927, that Congress did not desire to limit the protection afforded to Indian tribes by section 81 and that Congress was aware that section 81 applied to "businessmen dealing with tribes." H.R. Rep. No. 2449, 85th Cong., 2d Sess. 1 (1958) *reprinted in* 1958 U.S.C.C.A.N. 3961, 3961.

The present case falls within Congress' intended spirit for section 81. Here an attorney seeks to recover from an Indian tribe the costs of legal services the attorney has purportedly rendered to a client other than the Indian tribe. If the law firm is going to be afforded a contractual remedy to recover the costs of its fees directly from the Tribe, the form and execution of the underlying contract should comply with the protectionist provisions of 25 U.S.C. § 81. Such provisions include expressly identifying the attorney as a party in interest, identifying the amount or rate of the attorney fees and obtaining the requisite approval of the Secretary of the Interior. 25 U.S.C. § 81, Pet. App. 45. In order for Altheimer to have a direct claim against the Tribe, Altheimer should have complied with these requirements.

D. The Seventh Circuit Abdicated Federal Responsibility To Protect Indian Tribes, Which Necessitates Immediate Involvement By This Court.

Prior to the Seventh Circuit's opinion, section 81 had been given broad application by the courts. *See Barona Group of Capitan Grande Band of Mission Indians*, 840 F.2d at 1403-04; *United States ex rel. Shakopee*, 616 F. Supp. at 1216-18. Based on the Seventh Circuit's decision, however, contracts can be drafted to circumvent the protection provided by section 81. All that is needed is a shrewd attorney. The character and magnitude of the potential impact of the opinion below is illustrated by the kinds and types of transactions outsiders are entering into with Indian tribes. For example, outside entrepreneurs are seeking to involve themselves with Indian tribes in disposing toxic and nuclear waste upon Indian lands, in gaming operations on Indian lands, in promoting tribal resource development and in operating and supplying various kinds of businesses on tribal land.[10] Indeed the ramifications of the Seventh Circuit's decision are already being felt.[11]

It is readily apparent that the principles set down by the Seventh Circuit will have an immediate and profound impact on existing and future commercial relationships be-

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[10] *See* Michael Satchell, *Trashing the Reservations?*, U.S. News & World Report, Jan. 11, 1993, at 24; *Gambling; Bugsy and the Indians*, Economist, Mar. 21, 1992, at 27; David Segal, *Dances with Sharks; Why the Indian Gaming Experiment's Gone Bust*, Wash. Monthly, Mar. 1992, at 26.

[11] *See, e.g., In re United States ex rel. Hall*, 1993 WL 246402. (D. Minn. May 27, 1993) (following and further extending the limitations of the scope of § 81 as announced by the Seventh Circuit, 42 lawsuits involving various types of contracts were found not to fall within the scope of § 81).

tween Indian tribes and non-Indians, on tribal lands and on Indian culture and polity. Accordingly, this Court should accept review to expound on the reach of the protectionist provisions of 25 U.S.C. § 81.

CONCLUSION

For the foregoing reasons, this court should grant petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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